STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 8, 2008
v	No. 273746 Kalamazoo Circuit Court
CRISTIAN EDUARDO LARA, Defendant-Appellant.	LC No. 05-001751-FC

Before: Bandstra, P.J., and Meter and Beckering, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of second-degree criminal sexual conduct (CSC II), MCL 750.520c(1)(a), and sentenced to 18 months' to 15 years' imprisonment. Defendant appeals as of right. We affirm.

The victim in this case was defendant's seven-year-old niece. The victim testified that on one occasion when she visited defendant's house, he asked her to go with him to his bedroom. Following his instructions, she entered the bedroom, where he had her remove her shorts and lay on defendant's bed. Defendant then pulled down the victim's underwear. He "took his private part out of his boxers" and put it into her "private part." "It felt nasty" and "slimy" to the victim. Defendant did not say anything, but he made "weird" breathing noises.

Later the same day, while the victim and defendant were lying on the couch watching television, defendant "did the same thing." The victim testified that she pulled her shorts down because she knew defendant "was going to do something." Defendant put his "private part" into her "private part." Defendant then put his pointer finger, which he had just put into his mouth to get wet, into the victim's "private part" and moved it around. Defendant's finger went further into her "private part" than did his "private part." Defendant did not say anything, but he made the same breathing noises.

In August of 2005, the victim described the sexual contact between her and defendant to her mother after she was observed straddling her younger sister in a sexual fashion and saying, "this is how it's done." After the victim's mother filed a police report, Officer Tim Tull interviewed defendant at his place of employment. During the interview, defendant described three incidents wherein he engaged in inappropriate conduct with the victim. First, while drying the victim off after she took a bath, defendant intentionally touched her vagina with his finger.

Second, while wrestling with the victim and her sister, defendant pinned the victim to the ground with one hand and, with his other hand he touched the victim's vaginal area over her clothing. Third, when the victim sat on defendant's lap, she grabbed his penis. Defendant, shocked, informed the victim that her conduct was wrong and that she should not do it again. Defendant subsequently told Detective Amy Hicok that his touchings of the victim were intentional. Following his arrest, defendant relayed to Detective Jason Hendrick the same three incidents he had told Detective Tull. Upon being told that the victim had visited a pediatrician, defendant lowered his head and asked if he had hurt the victim. When Detective Hendrick replied that he could not answer the question, defendant began to cry. He then asked the detective what would happen if he admitted everything or took the blame.

In September of 2005, the victim's pediatrician Dr. Christopher Cwik examined the victim's genitalia. He did not see evidence of trauma. In January of 2006, Dr. Collette Gushurst, a pediatrician and an expert in child sexual abuse, examined the victim. Dr. Gushurst testified that she saw no evidence of a torn hymen or of any trauma. Dr. Gushurst cautioned, however, that the hymen could be penetrated without being torn. During the examination, Dr. Gushurst asked the victim if anyone other than her and Dr. Cwik had touched her in her "private area." The victim replied that, when she was six, defendant started touching her with his finger. She did not know how many times it had happened. The victim indicated that defendant had touched her on the inner surface of the labia majora and the tissues around the hymen. She was not sure if defendant touched her inside her vagina.

Defendant testified that he would never do anything to hurt the victim, and that the victim must have mistaken some of their contact as inappropriate. He explained that, when he was helping the victim dry off, the towel slipped from his hand and he accidentally touched the victim's crotch. He immediately apologized to the victim. There was no penetration, and the touching was not done for a sexual purpose. Defendant further explained that, during the second incident, he was merely wrestling with the victim when he touched her crotch. During the third incident, the victim, while sitting on his lap, placed her hands behind her back and grabbed his penis. Defendant "freaked out." When he told the victim she could not do that, the victim apologized to him. Defendant testified that, because he did not want the victim "to go through anything," he would take the blame.

I

Defendant first argues that the trial court erred in granting the prosecutor's motion to amend the information to add alternative counts of CSC II, stating it was impermissible because CSC II is a cognate lesser offense of first-degree criminal sexual conduct (CSC I). We disagree. We review a trial court's decision to grant a motion to amend an information for an abuse of discretion. *People v McGee*, 258 Mich App 683, 686-687; 672 NW2d 191 (2003). A trial court abuses its discretion when it fails to select a principled outcome. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

CSC II is a cognate lesser offense of CSC I because it is possible to commit CSC I without having committed CSC II. *People v Lemons*, 454 Mich 234, 253-254; 562 NW2d 447

(1997).[1] Thus, the trial court erred when it stated that, based on the facts of the present case, CSC II was a necessarily included lesser offense of CSC I. However, the trial court granted the prosecutor's motion to amend the information because it believed that the evidence presented at the preliminary examination independently supported alternative counts of CSC II, not because it erroneously believed that CSC II was a necessarily included lesser offense of CSC I. Defendant does not challenge the trial court's conclusion in this regard.

In *People v Cornell*, 466 Mich 335, 353-359; 646 NW2d 127 (2002), our Supreme Court found that instructions on uncharged cognate lesser offenses are impermissible because they do not provide the defendant with adequate notice that he might be charged with and convicted of the lesser offense. See also *People v Apgar*, 264 Mich App 321, 327; 690 NW2d 312 (2004). *Cornell*, *supra*, is inapplicable, however, to the present case. The CSC II charge of which defendant was convicted was not an uncharged offense, but rather was added to the information as an alternative charge more than three months before trial. Thus, defendant had notice that he was charged with and could be convicted of CSC II. Under the circumstances, the trial court did not abuse its discretion in granting the prosecutor's motion to amend the information.

II

Next, defendant argues that the trial court abused its discretion when it allowed the prosecutor to question him about his immigration status. According to defendant, this evidence was irrelevant and unfairly prejudicial because it was used to inflame the prejudices of the jury. To preserve an evidentiary issue for appellate review, the party opposing the admission of the evidence must object at trial and specify the same ground for objection that the party asserts on appeal. MRE 103(a)(1); *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

At trial, defense counsel immediately objected when the prosecutor began questioning defendant about his immigration status. Although the trial court discussed the objection with the parties off the record (defense counsel asked to approach the bench, presumably to address the matter out of the earshot of the jurors), it is apparent that defense counsel objected to the evidence on the grounds of relevance and unfair prejudice. We, therefore, treat defendant's claim of error as preserved and review the trial court's decision for an abuse of discretion. See *People v McGhee*, 268 Mich App 600, 636; 709 NW2d 595 (2005) (stating that this Court reviews a trial court's decision to admit evidence for an abuse of discretion).

Evidence is relevant if it has a tendency to make the existence of a fact of consequence more or less probable. MRE 401; *People v Crawford*, 458 Mich 376, 388; 582 NW2d 785 (1998). Generally, all relevant evidence is admissible. MRE 402; *Crawford*, *supra* at 388. Even if relevant, however, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, undue delay,

[1] We note that the Supreme Court recently addressed this issue in *People v Nyx*, 479 Mich 112; 734 NW2d 548 (2007) and came to the same conclusion, although the Court was divided, and Justices Young, Weaver, and Corrigan were of the opinion that CSC II is a necessarily included lesser offense, rather than a cognate lesser offense, of CSC I. See *Id.* at 143 (Young, J., concurring in part and dissenting in part) and 154 (Corrigan, J., dissenting).

waste of time, or needless presentation of cumulative evidence. MRE 403; *People v Sabin (After Remand)*, 463 Mich 43, 58; 614 NW2d 888 (2000); *Aldrich*, *supra* at 114. "Evidence is unfairly prejudicial when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury." *People v Ortiz*, 249 Mich App 297, 306; 642 NW2d 417 (2001); MRE 403.

At trial, the prosecutor elicited testimony from defendant that he was not a citizen of the United States and that, if he were convicted of the charged offenses, he would be deported. In admitting the evidence, the trial court found that it was relevant to defendant's credibility as a witness, in that it served as a potential motivation to lie about the charged conduct. We acknowledge that a witness's credibility is relevant when the witness is offering relevant testimony. *People v Mills*, 450 Mich 61, 72; 537 NW2d 909 (1995), mod 450 Mich 1212 (1995). We find, however, that evidence of defendant's immigration status was only marginally probative, at best, on the issue of credibility, and added very little to the proposition that a defendant may be motivated to lie to avoid the consequences of criminal behavior. Further, as this Court stated in *George v Travelers Indem Co*, 81 Mich App 106, 114; 265 NW2d 59 (1978), "even in the occasional case where racial, ethnic, or religious matters are relevant to the issues, there is always the risk of incidentally arousing prejudice – and this Court abhors injecting the poison of prejudice into any legal proceeding." In light of the marginally probative value of the evidence regarding defendant's immigration status and the danger of unfair prejudice to defendant, we find that the trial court abused its discretion in admitting the challenged evidence.

Nonetheless, we find that the trial court's admission of the evidence was harmless error. Even if a trial court abuses its discretion in admitting or excluding evidence, reversal is warranted only if it affirmatively appears, after review of the entire record, that it is more probable than not that the court's error was outcome determinative. *People v Lukity*, 460 Mich 484, 495-496; 596 NW2d 607 (1999); *People v McLaughlin*, 258 Mich App 635, 650; 672 NW2d 860 (2003). At trial, the victim provided detailed testimony about one instance when defendant used his penis to penetrate her vagina, and another instance when he used both his penis and his finger. The victim also told her mother and one of the pediatricians who examined her that defendant touched her inappropriately. Further, according to the testimony of three detectives, defendant admitted to intentionally touching the victim's vagina on at least two occasions. Under the circumstances, we cannot conclude that the jury convicted defendant because of prejudice rather than the evidence supporting his guilt. Reversal is not warranted.

III

Defendant next argues that he was denied a fair trial when the prosecutor, in her closing statement, appealed to the jury to sympathize with the victim. We disagree. We review defendant's unpreserved claim of prosecutorial misconduct for plain error affecting his substantial rights. *People v Cox*, 268 Mich App 440, 451; 709 NW2d 152 (2005). Plain error exists if the error resulted in the conviction of an innocent defendant or "seriously affected the fairness, integrity, or public reputation of judicial proceedings, independent of defendant's innocence." *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999). We review claims of prosecutorial misconduct on a case-by-case basis, examining the entire record and evaluating the prosecutor's remarks in context. *People v Thomas*, 260 Mich App 450, 454; 678 NW2d 631 (2004).

A prosecutor may not appeal to the jury to sympathize with the victim. *People v Watson*, 245 Mich App 572, 591; 629 NW2d 411 (2001). In this case, however, the prosecutor's statements did not blatantly appeal to the jury's sympathies. While her statements may have placed the victim in a sympathetic light, the prosecutor asked the jury to believe the victim, not to sympathize with the victim. The prosecutor argued that "the heartache, the pain, the embarrassment, and the punishment" the victim suffered since she told her mother about defendant's abuse and the victim's "incredible detail about being molested by" defendant, indicated that the victim told the truth when she testified at trial. Because a prosecutor may argue from the facts that a witness is credible, *McGhee*, *supra* at 630, and because a prosecutor need not state her arguments in the blandest terms possible, *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004), the prosecutor's statements did not deny defendant a fair trial.

In the alternative, defendant argues that his trial counsel was ineffective for failing to object to the prosecutor's statements. Because defendant did not request a new trial or a *Ginther*[2] hearing, our review of his claim is limited to errors apparent on the record. *People v Rodriguez*, 251 Mich App 10, 38; 650 NW2d 96 (2002). To establish his claim, defendant must prove that counsel's performance was deficient and that, under an objective standard of reasonableness, he was denied his Sixth Amendment, US Const Am VI, right to counsel. *People v Mack*, 265 Mich App 122, 129; 695 NW2d 342 (2005). Because the prosecutor's comments were proper, however, any objection by counsel would have been futile. Counsel cannot be deemed ineffective for failing to make a futile objection. See *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Accordingly, defendant was not denied the effective assistance of counsel.

IV

Finally, defendant argues that the trial court erred by scoring 25 points for offense variable 13, MCL 777.43. Specifically, defendant argues that the trial court violated his Sixth Amendment, US Const Am VI, right to trial by jury, as articulated in *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument is without merit. Our Supreme Court has definitively ruled that *Blakely*, *supra*, does not affect Michigan's indeterminate sentencing scheme. *People v McCuller*, 479 Mich 672, 683; 739 NW2d 563 (2007); *People v Harper*, 479 Mich 599, 615; 739 NW2d 523 (2007); *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730-731 n 14; 684 NW2d 278 (2004).

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter
/s/ Jane M. Beckering

[2] *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973).